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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

REPUBLICAN NATIONAL COMMITTEE, *et. al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Table of Contents

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
ARGUMENT	
1. Compelled Adherence to Expenditure Limitations	6
2. Restrictions on Grass Roots Activity	7
3. Prohibition on Small Contributions	9
4. Impact on Pending Legislative Proposals	12
5. The Unconstitutional Conditions Doctrine	13
CONCLUSION	15

Table of Authorities

Cases	Page
American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973)	2, 11
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	11
Buckley v. Valeo, 424 U.S. 1 (1976)	passim
Corbitt v. New Jersey, 439 U.S. 212 (1978)	14
Elrod v. Burns, 427 U.S. 347 (1963)	13
Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, ___ F.2d ___ (2d Cir., Feb. 4, 1980)	2
Keyishian v. Board of Regents, 385 U.S. 589 (1976)	14
McCulloch v. Maryland, 4 Wheat. 316 (1819)	7
Mills v. Alabama, 384 U.S. 214 (1966)	1, 9
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	1, 9
Mott v. Federal Election Commission, Civil Action No. 79-3375 (D.D.C.)	3
New York Civil Liberties Union v. Acito, 459 F. Supp 75 (S.D.N.Y. 1978)	2

Cases	Page
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	1, 9
Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947)	14
Perry v. Sindermann, 408 U.S. 593 (1972)	14
Sherbert v. Verner, 374 U.S. 398 (1963)	14
Snepp v. United States, ___ U.S. ___, 48 U.S.L.W. 3527 (Feb. 19, 1980)	14
Socialist Workers Campaign Committee v. Jennings, 567 F.2d 1133 (D.C. Cir. 1977)	2
Staats v. ACLU, 422 U.S. 1030 (1975)	2
United States v. National Committee for Impeachment, 469 F.2d 1135 (2d. Cir. 1972)	2
Vanesco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) aff'd 423 U.S. 1041	2
Whitney v. California 274 U.S. 357 (1927)	4
Wyman v. James, 400 U.S. 309 (1971)	14

Statutes — Page

Federal Election Campaign Act of 1971 As Amended . . . . . passim

2 U.S.C. §437h 5

2 U.S.C. §441(b)(7) 8

26 U.S.C. §9003(b)(2) 8

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On Appeal from the United States Court of Appeals for the Second Circuit

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Brief of the American Civil Liberties Union, Amicus Curiae, in Support of the Jurisdictional Statement

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This brief is submitted to urge the Court to note probable jurisdiction and to accord plenary review to the important constitutional issues the case raises.

Interest of Amicus Curiae*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the principles contained in the Bill of Rights to the Constitution. Primary among those guarantees are the First Amendment protections of freedom of speech and association. The ACLU agrees with this Court that rights of speech and association have their "fullest and most urgent application precisely to the conduct of campaigns for public office," Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). Except perhaps in erecting a barrier to prior restraints, the First Amendment's most important office is to insure that political speech in general - and campaign speech in particular - will be as uninhibited and unrestricted as possible. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Mills v. Alabama, 384 U.S. 214 (1966); Buckley v. Valeo, 424 U.S. 1 (1976).

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* Letters of consent from all parties to the filing of this amicus curiae brief are being lodged with the Clerk of the Court.

Because of the importance of political speech as the critical safeguard for a host of civil liberties values, the ACLU has viewed with deep concern the effect on First Amendment interests of the various campaign "reform" laws enacted in the last decade. Although we shared the concerns about political corruption that prompted passage of those laws - particularly the Federal Election Campaign Act of 1971 and the various amendments thereto (hereafter "FECA") - we came to the considered organizational conclusion that such laws did more harm than good to First Amendment interests.

The ACLU has vigorouly supported and participated in litigation to test the validity of campaign reform legislation that is in our view inconsistent with First Amendment values. See United States v. National Committee For Impeachment, 469 F.2d 1135 (2d Cir. 1972); American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), vacated as moot sub. nom., Staats v. ACLU, 422 U.S. 1030 (1975); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), aff'd, 423 U.S. 1041 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Socialist Workers Campaign Committee v. Jennings, 567 F.2d 1133 (D.C. Cir. 1977); New York Civil Liberties Union v. Acito, 459 F. Supp. 75 (S.D.N.Y. 1978); Federal Election Commission v. Central Long Island Tax

Reform Immediately Committee, ___ F.2d ___ (2d Cir., Feb. 4, 1980) (en banc); Mott v. Federal Election Commission, Civil Action No. 79-3375 (D.D.C.). Because of these cases, we have been forced to grapple with the seemingly inherent tension between campaign reform efforts and First Amendment principles, and we have tried to be receptive to methods that could reconcile the clash between reform and free speech.

The issues in this case present the same clash of values. In our governing bodies, the ACLU has debated long and hard the very issues posed by this case. We do not assert that public funding is, per se, inconsistent with the First Amendment and civil liberties principles. We do assert that certain restrictions that are imposed as a condition of obtaining public funding are inconsistent with the First Amendment and civil liberties principles. We have concluded that the values of public funding can be preserved without abridging free speech or civil liberties principles by using public subsidies to provide a floor for funding campaign activities without imposing a ceiling that limits such activities. Whether such an approach is good public policy is for others to decide. What commends it to us is that it embodies the sound civil liberties principle that where speech activity is

asserted to pose societal evils, the First Amendment response should not be to restrict or condition the speech itself, but rather to supply the remedy of "more speech." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

Regrettably, that is not the premise of the public funding provisions of the FECA at issue in this case. With respect to presidential candidates, those provisions combine to impose severe restrictions on the receipt of public funding. With respect to supporters of publicly-funded candidates, the effect on spontaneous grass-roots activity has been crippling, and the prohibition on even the most modest campaign contributions is total. The statute at issue affects political speech by and about presidential candidates, and thus cuts close to the core of the interests protected by the First Amendment. The resolution of this case will also bear critically on proposals to provide public funding for all federal political campaigns. We think the court below failed to appreciate the gravity of those issues and the magnitude and nature of the restrictions on campaign speech imposed by the challenged provisions of the Act. For the following reasons, the issues raised by this case require plenary consideration by this Court.

ARGUMENT

Our purpose at this point is a limited one; it is to suggest to the Court why plenary consideration of the issues raised by this case is warranted. In the area of campaign controls, many challenges to statutory or regulatory restrictions are rooted in First Amendment concerns, because many of those restrictions burden or prohibit campaign speech. Perhaps that is one reason why the Congress, in enacting the FECA, established the extraordinary judicial review procedures contained in 2 U.S.C. §437h, which require expedited consideration and disposition by this Court of the issues involved in this case. Although §437h does not mandate plenary consideration of those issues, we submit that plenary consideration is imperative in this case. The statutory provisions at issue systematically affect the raising and spending of money in presidential campaigns. These laws have a profound impact on presidential candidates and the parties they represent. But even more importantly, from our perspective, public funding provisions seriously cripple or totally prohibit political activity at the grass roots level and by small contributors. Given these consequences, the issues surely warrant careful and full review by this court.

1. Compelled Adherence to Expenditure Limitations

The major 1974 Amendments to the FECA had two basic substantive purposes that were in our view at odds with First Amendment values. The first was to place severe restrictions on the amount that any individual could contribute to a political candidate, ostensibly to eliminate the corrupting influence of large campaign contributors. In Buckley, this Court upheld such contribution limits, and candidates and campaigns have struggled under those limitations ever since. The other purpose of the 1974 law was to impose overall spending limitations on all federal political campaigns, ostensibly because there was "too much" campaign speech, campaigns had become "Romanesque political extravagances," Buckley v. Valeo, 519 F.2d 821, 897, and equality principles justified regulating the quantity of speech in which candidates should engage. These latter purposes, however, cut too deeply at the core of First Amendment values, and Buckley ruled direct expenditure limitations unconstitutional.

In our view, the public funding provisions attempt to achieve indirectly the same result this Court held unconstitutional when sought to be secured directly, namely, limitations on the quantity - and thereby the

quality and nature - of campaign speech. Although other justifications for the funding conditions have been suggested - freeing candidates from the burdens of private fund-raising and the obligations which might ensue - the continued existence of contribution limits, not challenged here, secure the latter goal, while the burdens of private fund-raising have been replaced by the burdens of accounting for and struggling under the spending limitations attached to the public subsidy. In addition, on an almost daily basis, newspaper accounts indicate the difficulties the current presidential campaigns are experiencing in effectively communicating their views to the public within the subsidies available to them. In short, we believe the various rationales advanced to support the statute are a pretext, masking the true congressional motivation of compelling presidential candidates to adhere to prescribed spending limits. Cf. McCulloch v. Maryland, 4 Wheat. 316, 423 (1819). Such legislation should be subject to the closest scrutiny by this Court.

2. Restrictions on Grass Roots Activity

The record in this case demonstrates how the public funding/expenditure limitation scheme has fundamentally altered the nature and quality of presidential campaigns. The

funding scheme has had two major effects on the quality and range of campaign activity. First, the low ceilings on permissible expenditures dictate a heavily-centralized, media-oriented campaign. The consequence is that few if any funds are available from the national campaigns to support the essentials of traditional grass roots political activity: local storefronts, rallies, mailings, canvassings, campaign literature, phone banks - all of the indicia of citizen participation that used to be the hallmark of American presidential campaigns. The other effect on grass roots activity is that once a presidential candidate has accepted public funds, no one may make any "contribution" to such a candidate. 26 U.S.C. §9003(b)(2). "Contribution" is defined not only as a donation made directly to a campaign, but also as any expenditure of funds made "in cooperation, consultation, or concert with" a publicly-funded campaign. 2 U.S.C. §441(b)(7). As a result, local grass roots supporters who wish to expend their own funds to support a presidential candidate must remain totally isolated from and "uncoordinated" with that campaign. Even a 10-cent phone call to the state campaign headquarters to purchase a supply of bumper strips is a prohibited "coordinated"expenditure and is unlawful under the Act.

The combination of these two effects, predictably enough, has resulted in a virtual drying up of grass roots campaigning. The vital, spontaneous local activity which for so long characterized our presidential campaigns has been removed from the political landscape, leaving, in its place, arid and sterile media-centered campaigns. The demographics of advertising have replaced the politics of participation. Such a result is not only bad public policy, it also flies in the face of this Court's teaching that the critical mission of the First Amendment is to insure robust speech about candidates for public office, see New York Times Co. v. Sullivan, and that the importance of such speech is magnified during the critical days and weeks preceding an election. Mills v. Alabama, 384 U.S. 214 (1966); Monitor Patriot Co. v. Roy, supra.

3. Prohibition on Small Contributions

Under the public funding scheme, a presidential candidate who accepts funding for the general election, whether "voluntarily" or not, thereby prohibits anyone from making even the most modest monetary contribution to his presidential campaign. This Court in Buckley recognized that making a contribution to the political candidate of one's choice constitutes "the symbolic expression of support" for a candidate,

424 U.S. at 21, and involves important associational rights: "making a contribution, like joining a political party, serves to affiliate a person with a candidate." Id., at 22. "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" Id., at 65-66. Although in Buckley this Court upheld the $1,000 contribution limit, it did so because it found that contributions of more than that amount did not significantly intensify the speech and associational rights involved and did implicate countervailing concerns with corruption or the appearance thereof. Here, however, the scheme does not just restrict the incremental speech or associational values reflected by a contribution in excess of $1,000; rather it precludes the exercise of such symbolic and associational rights at all, by completely prohibiting even a $1.00 contribution to a publicly-funded candidate.

Apart from voting itself, making a small contribution to the candidate of one's choice is among the most fundamental acts of political participation in which a citizen can engage. At least the public funding matching grant scheme at the primary election stage permits

this important form of political speech and association to occur. But the general election funding seheme prohibits it completely.

The response of the court below was that the infringement of the small contributor's First Amendment interests was the product not of government coercion, but of the candidate's "choice" to forgo private financing and accept public funding. Even accepting the premise - which we do not - that the candidate's choice is voluntary, and not the product of coercion attributable to legal and practical inhibitions imposed on a privately-financed campaign, it remains highly questionable to permit the government to delegate to the candidate the authority to impose a systematic veto on the symbolic and associational rights of his supporters who wish to make contributions to him. Cf., Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); ACLU v. Jennings, supra, 366 F. Supp. at 1048-1054 (invalidating FECA provision that, as part of a scheme to limit candidate expenditures for mass media advertising, effectively permitted candidates to veto any advertisement "on behalf of" any candidate).

4. Impact on Pending Legislative Proposals

Plenary review of the decision below is imperative for another reason. The issues in this case directly affect communication to the public by presidential campaigns. That alone is sufficient to warrant full consideration by this Court. But the decision below, if summarily upheld, will have direct ramifications on pending legislative proposals seeking to extend the public financing schemes at issue herein to House and Senate elections as well as to state and local campaigns. Although many of the constitutional issues raised by conditions imposed upon public funding of these various campaigns would be the same as the questions raised here, there are significant variations which might affect the resolution of those issues. Different kinds of fund-raising problems might alter the analysis of whether candidates are, in fact, compelled to accept public funding and spending or contribution limits attached thereto. The advantages of incumbency in congressional and state elections might have a different impact on assessing the public funding scheme. Questions concerning the appearance of corruption or the problems of reliance on private financing might vary as well.

Proponents of these various proposals will surely point to the decision below as upholding the constitutionality of public funding schemes that condition the receipt of funds on the imposition of spending ceilings and the prohibition of any private funding. Given the ripple effect the decision below is likely to have on these various proposals, it is important for this Court fully to consider the constitutional issues tendered in this case.

5. The Unconstitutional Conditions Doctrine

Finally, this case raises important issues that go beyond the area of campaign financing. Those issues cluster around the problem of unconstitutional conditions. At the heart of the decision below is the ruling that a condition otherwise unconstitutional - the limitation on campaign expenditures and the prohibition of private contributions, see Buckley v. Valeo, supra - can be imposed upon the receipt of campaign subsidies, if not in general, at least where compelling interests are thereby served. This Court has generally held that "the denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." Elrod v. Burns, 427 U.S.

347, 361 (1976); see also, Sherbert v. Verner, 374 U.S. 398 (1963); Keyishian v. Board of Regents, 385 U.S. 589 (1976); Perry v. Sindermann, 408 U.S. 593 (1972). To be sure, this Court's application of the unconstitutional conditions doctrine has been less than unwavering. See Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947); Wyman v. James, 400 U.S. 309 (1971); Corbitt v. New Jersey, 439 U.S. 212 (1978); and most recently, Snepp v. United States, ___ U.S. __, 48 U.S.L.W. 3527 (Feb. 19, 1980).

The ACLU has long been concerned with the conditioning of public funds or benefits upon the surrender or limitation of protected liberties. This case clearly implicates such issues, both in terms of campaign financing and a host of other civil liberties areas as well. We are concerned about whether the decision below correctly applied the doctrine to the scheme at issue. But we are no less concerned about the implication of that ruling for areas far removed from campaign financing. Given those potential implications in a host of constitutional areas, we think plenary review by this Court is required.

CONCLUSION

For these reasons, probable jurisdiction should be noted, and the Court should give plenary consideration to the issues in the case.

Respectfully submitted,

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